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# YOU ARE NOW ENTERING THE SCHOOL ZONE, PROCEED WITH CAUTION: EDUCATORS, ARBITRATION, & CHILDREN'S RIGHTS

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YOU ARE NOW ENTERING THE SCHOOL ZONE, PROCEED WITH CAUTION:<sup>1</sup> EDUCATORS,  
ARBITRATION, & CHILDREN’S RIGHTS

By  
Raquel Muñiz \*

*“ . . . in serving the best interests of the children, we serve the best interests of all  
humanity.”— Carol Bellamy, Fourth Executive Director of UNICEF*

I. INTRODUCTION

A survey of cases suggests children’s rights have received minimal attention in the public school labor relations context.<sup>2</sup> However, children can be the third parties to consequences flowing from reinstatement of educators suspended for student-related disciplinary matters. Collective Bargaining Agreements (“CBAs”) in the primary and secondary education field are binding contractual agreements detailing employment terms and conditions (including pay, benefits, termination, and leave policies)<sup>3</sup> between unionized educators (employees) and the school districts (employers).<sup>4</sup> Courts have limited the scope of what public employees may bargain,<sup>5</sup> but procedures regarding employee disciplinary matters are generally negotiable under CBAs.<sup>6</sup> These procedures, including

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<sup>1</sup> Colloquial reference to American school zones, in which drivers must drive at a reduced speed limit and proceed with caution to avoid harming a child.

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<sup>2</sup> See discussion *infra* Section III.A.

<sup>3</sup> See generally *Collective Bargaining*, AM. FED’N OF LABOR AND CONGRESS OF INDUS. ORG., <http://www.aflcio.org/Learn-About-Unions/Collective-Bargaining> (last visited Sept. 16, 2016).

<sup>4</sup> See generally *Collective Bargaining: What It Is And How It Works*, NAT’L EDUC. ASS’N 1, <http://www.nea.org/assets/docs/120701-CBWhatIsandHow-itWorks-3page.pdf> (last visited Sept. 16, 2016).

<sup>5</sup> See, e.g., *Sch. Dist. v. Sch. Dist.*, 199 N.W.2d 752, 759 (Neb. 1972) (noting that boards should not be required to negotiate managerial prerogatives and matters of public policy).

<sup>6</sup> See, e.g., *N.J. Tpk. Auth. v. N.J. Tpk. Supervisors Ass’n*, 670 A.2d 1, 11 (N.J. 1996) (holding that procedural disciplinary measures, including binding arbitration, were negotiable and did not impinge on managerial prerogatives).

arbitration for disciplinary issues, are typically included (and preferred) in private and public CBAs between unions and employers.<sup>7</sup>

Arbitration of educator disciplinary matters in primary and secondary schools has resulted in arbitrators reinstating questionable educators.<sup>8</sup> For example, in *Colonial Intermediate Unit #20 v. Colonial Intermediate Unit #20, Education Association*, (“*Colonial Intermediate Unit*”), the Appellate Court affirmed the trial court’s determination that the arbitrator’s award, reinstating a special education teacher, was “rationally derived from the CBA, and . . . did not violate a well-defined, dominant public policy.”<sup>9</sup> The teacher had a history of humiliating students, calling students names such as “loser, sissy, liar, knucklehead, crybaby and chubby butt,”<sup>10</sup> twisting the students’ arms, placing students in corners for up to three days, pushing their heads, and placing an “I Abuse Animals” sign around a student’s neck.<sup>11</sup> The Appellate Court found the “[a]rbitrator determined [the teacher’s] conduct did not constitute immorality, cruelty, persistent negligence, willful violation of Employer’s directives, or willful neglect of duties” in violation of the School Code.<sup>12</sup> The intermediate unit appealed the decision, but the Supreme Court of Pennsylvania denied the appeal.<sup>13</sup> The arbitrator and the lower courts in this case did not directly consider the subsequent effects on the students upon reinstatement of the teacher.<sup>14</sup> While the courts cannot engage in speculation, returning a questionable teacher to the classroom may place current and future students at risk. For example, a teacher who has difficulty controlling his or her temperament might have an outburst against the students upon reinstatement.

Arbitrators and courts in these types of cases often focus their analysis on the terms of the underlying contract, namely the CBA, and other rules and regulations included by incorporation.<sup>15</sup> In other words, the analysis treats the arbitration of educator discipline matters primarily as a traditional contract interpretation case and does not directly weigh

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<sup>7</sup> See generally *A Practical Guide to Grievance Arbitration*, AM. BAR ASS’N 1 (Dec. 18, 2012), [http://www.americanbar.org/content/dam/aba/events/labor\\_law/basics\\_papers/nlra/grievance\\_arbitration.aucthcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/nlra/grievance_arbitration.aucthcheckdam.pdf).

<sup>8</sup> See, e.g., *Colonial Intermediate Unit #20 v. Colonial Intermediate Unit #20 Educ. Ass’n*, No. 839 C.D. 2014, 2015 Pa. Commw. Unpub. LEXIS 103, at \*1 (Pa. Commw. Ct. Feb. 9, 2015).

<sup>9</sup> *Id.* at \*2.

<sup>10</sup> *Id.* at \*5.

<sup>11</sup> *Id.* at \*3-5.

<sup>12</sup> *Colonial Intermediate Unit #20*, 2015 Pa. Commw. Unpub. LEXIS 103, at \*6.

<sup>13</sup> *Colonial Intermediate Unit #20 v. Colonial Intermediate Unit #20 Educ. Ass’n*, No. 305 MAL 2015, 2015 Pa. LEXIS 2153, at \*1 (Pa. Sept. 29, 2015).

<sup>14</sup> See *Colonial Intermediate Unit #20*, 2015 Pa. Commw. Unpub. LEXIS 103, at \*1.

<sup>15</sup> See *id.*

the wellbeing of the students. It is true that, for example, when the arbitrator or court considers whether the teacher's behavior violated public policy or constituted cruelty toward children in violation of the governing school code, the arbitrator or court may encompass the children's interest in their analysis.<sup>16</sup> However, this is only a vicarious incorporation and results only in indirect benefits, if any at all, to the children.<sup>17</sup> The arbitrator and court are engaging primarily in analysis of substantive contract law concerning the employee and employer and do not discuss the children's wellbeing.

The fact that children are minors and that schools act in *loco parentis* during school hours,<sup>18</sup> warrants a different approach to arbitration in educator discipline cases. For the reasons stated above, arbitration of disciplinary matters vis-à-vis primary and secondary public school educators is of a different nature than traditional employee-employer arbitrable disputes. Public schools should be considered a *sui generis* category in labor relations arbitration. Safeguards should be adopted to directly address the children's wellbeing when determining whether a teacher, suspended for questionable behavior, should be reinstated to the classroom.

This article first provides background information on CBAs and arbitration clauses in public employee labor relations contracts to underscore the evolving relationship between the employer and employees. This background is important to assess the feasibility of the safeguards proposed later. Next, this article will explore arbitration cases in school employer-educator union CBAs, focusing particularly on employee disciplinary matters. Then, this article will explain why primary and secondary public schools should be categorized as a *sui generis* sphere in which consequences of arbitrable disciplinary matters extend beyond the traditional public employer-employee relation. Finally, this article will propose workable and sustainable safeguards to protect children's rights in arbitration of educator discipline cases. After all, though not co-extensive with adult rights, children have rights, and they do not "shed" them at the "schoolhouse gate."<sup>19</sup>

## II. BACKGROUND

This section presents a brief history of collective bargaining and arbitration clauses in CBAs. This information is important because the historical and background information provides important context on public employer-employee labor relations. The background illustrates the degree of bargaining power that unions and employers have, the self-interests both parties bring to the collective bargaining process, and the benefits and limitations both parties may derive from collective bargaining. This background is the foundation for the workable, sustainable safeguards proposed.

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<sup>16</sup> See, e.g., *Colonial Intermediate Unit #20*, 2015 Pa. Commw. Unpub. LEXIS 103, at \*6-31.

<sup>17</sup> *Colonial Intermediate Unit #20*, 2015 Pa. Commw. Unpub. LEXIS 103, at \*6-31.

<sup>18</sup> See *N.J. v. T.L.O.*, 469 U.S. 325, 336 (1985) ("Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State . . .").

<sup>19</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); see also *Collective Bargaining*, *supra* note 3.

### A. Brief History on Collective Bargaining

Collective bargaining is the process by which employees, represented collectively through their unions, negotiate the terms and conditions of their binding, written employment contract (the CBA) with their employer.<sup>20</sup> These labor employment contract terms include the employees' "pay, benefits, hours, leave, job health and safety policies, ways to balance work and family," and other workplace-related conditions.<sup>21</sup>

Unionization and collective bargaining in the employment arena trace their roots to the pre-Revolution era.<sup>22</sup> As early as 1741, employees joined collectively to protest labor issues: New York City bakers quit their jobs and protested the regulation of the price of bread.<sup>23</sup> Other craftsmen employees, including carpenters and shoemakers, also formed informal unions and crafted primitive, large-scale agreements with their employers in the years following the bakers' protest.<sup>24</sup> The employees frequently advocated for better working conditions, such as higher wages, the adoption of a minimum wage rate, and shorter work hours.<sup>25</sup> These organization efforts came to a halt during the depression era in the late 1830s.<sup>26</sup> Large-scale efforts returned during the mid-nineteenth century with national federations, such as the National Labor Union (1866), the Noble Order of the Knights of Labor (1869), and the Federation of Organized Trades and Labor Unions (1881), joining the organized labor arena.<sup>27</sup> Despite the growth of organized unions, employers seldom recognized or tolerated these unions because employers perceived labor unions as an encroachment on the employers' managerial powers.<sup>28</sup> The employers often resisted the unionization of employees by employing nonunion employees and assisting in the prosecution of unions for conspiracy to restrain trade.<sup>29</sup>

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<sup>20</sup> See generally ANGELO DENISI & RICKY GRIFFIN, HR (3d ed. 2015) (detailing the collective bargaining process); see also *Collective Bargaining: What It Is And How It Works*, *supra* note 4.

<sup>21</sup> See *Collective Bargaining*, *supra* note 3.

<sup>22</sup> JAMES A. RAPP, EDUCATION LAW, CH. 7, § 7.01 (Matthew Bender & Co. 2016).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> U.S. DEP'T OF LABOR, BRIEF HISTORY OF THE AMERICAN LABOR MOVEMENT 1 (1976), [https://fraser.stlouisfed.org/files/docs/publications/bls/bls\\_1000\\_1976.pdf](https://fraser.stlouisfed.org/files/docs/publications/bls/bls_1000_1976.pdf).

<sup>26</sup> See Rapp, *supra* note 22, § 7.01.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See BRIEF HISTORY OF THE AMERICAN LABOR MOVEMENT, *supra* note 25, at 3.

Statutorily formalized collective bargaining has a relatively shorter history.<sup>30</sup> In 1935, the United States Congress enacted the Wagner Act,<sup>31</sup> which after several amendments, became known as the National Labor Relations Act (“NLRA”).<sup>32</sup> The NLRA declares the right and outlines the procedure for collective bargaining in the private sector.<sup>33</sup> The NLRA served to restore equality of bargaining power between the employees and their employers.<sup>34</sup>

Other major federal pieces of legislation changed and legitimized organized labor in the United States.<sup>35</sup> The Norris-LaGuardia Act of 1932 removed the courts’ power to enjoin certain union activities.<sup>36</sup> The Labor Management Relations Act, also known as the Taft-Harley Act of 1947, prohibited closed shops that required union membership as a condition for employment, among other clauses.<sup>37</sup> The Labor Management Reporting and Disclosure Act of 1959, also known as the Landrum-Griffin Act, imposed internal union regulations and democratized labor unions internally by, for example, requiring internal voting on union decisions.<sup>38</sup>

Legislatively recognized collective bargaining for state and federal public employees is a fairly novel concept.<sup>39</sup> In 1959, Wisconsin passed the Municipal Employment Relations Act, granting public employees the right to bargain collectively.<sup>40</sup> In 1962, President Kennedy issued Executive Order No. 10,988, granting federal government employees the right to assemble and bargain collectively.<sup>41</sup> Since then, states

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<sup>30</sup> See generally Steven J. Scott, *The Status Quo Doctrine: An Application to Salary Step Increases for Teachers*, 83 CORNELL L. REV. 194 (1997).

<sup>31</sup> Wagner Act of 1935, 29 U.S.C. §§ 151-169 (2016).

<sup>32</sup> 29 U.S.C. §§ 151-169 (2016).

<sup>33</sup> *Id.*

<sup>34</sup> See *Collective Bargaining: What It Is And How It Works*, *supra* note 4.

<sup>35</sup> See Rapp, *supra* note 22, § 7.01 (2).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See generally Lance Compa, *An Overview of Collective Bargaining in the United States*, CORNELL UNIVERSITY ILR SCHOOL 91 (2014), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1925&context=articles>.

<sup>40</sup> See Rapp, *supra* note 22, § 7.01.

<sup>41</sup> Exec. Order No. 11,988, 3 C.F.R. § 521 (1959-1963), *revoked by* Exec. Order 11,491, 3 C.F.R. § 861 (1966-1970), *reprinted as amended in* 5 U.S.C. § 7101 (1994).

across the nation have adopted similar laws that grant public employees the right to organize and bargain collectively for their contractual employment terms.<sup>42</sup>

Educators are among the public employees who resort to collective bargaining through unions in the workplace.<sup>43</sup> The National Education Association (NEA) and the American Federation of Teachers (AFT) are the two most prominent, active national teacher unions.<sup>44</sup> As of 2007, teachers in 34 states and the District of Columbia, education support professionals in 32 states, and higher education faculty in 28 states had the right to bargain.<sup>45</sup> On the other hand, six states explicitly prohibited bargaining in public education.<sup>46</sup> Today, most states allow collective bargaining in the public sector, particularly for public school educators, and at least one state, Missouri, guarantees the right to bargain collectively in its constitution.<sup>47</sup>

### *B. Arbitration Clauses in CBAs*

Arbitration clauses are not mandatory in employment contracts, but employers and unionized employees prefer to include these clauses in their CBAs.<sup>48</sup> Employment relation disputes are generally arbitrable in the United States.<sup>49</sup> Arbitration and the grievance procedure ensure that the contract terms are executed as initially agreed upon.<sup>50</sup> Unions favor arbitration clauses because arbitration allows a neutral third party to determine whether the management has violated the CBA.<sup>51</sup> The management would prefer a grievance procedure in which the aggrieved educator submits a grievance directly to the management, without third-party interference.<sup>52</sup> The latter rarely occurs, even though

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<sup>42</sup> See *Collective Bargaining: What It Is And How It Works*, *supra* note 4.

<sup>43</sup> *Id.*

<sup>44</sup> Rapp, *supra* note 22, § 7.01.

<sup>45</sup> See *Collective Bargaining: What It Is And How It Works*, *supra* note 4.

<sup>46</sup> *Id.*

<sup>47</sup> Rapp, *supra* note 22, § 7.01.

<sup>48</sup> See *A Practical Guide to Grievance Arbitration*, *supra* note 7, at 1 (“Even today it is the primary method utilized by public and private employers and unions to solve disputes that arise in the workplace under labor agreements.”).

<sup>49</sup> *Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2001) (holding that the Federal Arbitration Act (FAA) applies to all employment agreements, except for those involving transportation employees).

<sup>50</sup> Rapp, *supra* note 22, § 7.01.

<sup>51</sup> See *id.* § 7.04.

<sup>52</sup> Rapp, *supra* note 22, § 7.04.

arbitration is generally not statutorily mandated, because arbitration is beneficial in many respects.<sup>53</sup> Arbitration offers dispute resolution expediency at a low cost and arbitrators with expertise on education matters.<sup>54</sup>

The scope of arbitration agreements included in CBAs is subject to contract law interpretation and depends on the parties' intent.<sup>55</sup> A dispute in the workplace is not automatically subject to arbitration, unless "the grievance falls within the terms of the collective bargaining agreement"<sup>56</sup> and the CBA contains an arbitration clause. Pursuant to axioms of contract law, arbitration contracts are only valid when both parties have agreed to arbitrate.<sup>57</sup> While some courts may have required clear pro-arbitration language in the contracts in order to uphold arbitration clauses,<sup>58</sup> others have extended the federal favorable arbitration policy<sup>59</sup> into public contracts.<sup>60</sup>

Certain matters are not arbitrable, or in some cases, not even subject to bargaining.<sup>61</sup> Educators and their employers are not bound to arbitrate matters specifically excluded from

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<sup>53</sup> Rapp, *supra* note 22, § 7.04.

<sup>54</sup> *See id.*

<sup>55</sup> Rapp, *supra* note 22, § 7.01; *see, e.g.*, *Am. Arbitrations Ass'n v. N. Miami Cmty. Sch.*, 866 N.E.2d 296, 301 (Ind. Ct. App. 2007) ("When determining whether the parties have agreed to arbitrate a dispute, we apply ordinary contract principles governed by state law.").

<sup>56</sup> *Bd. of Educ. Of Chi. v. Ill. Educ. Labor Rels. Bd.*, Nos. 118043, 118072, 2015 Ill. LEXIS 1509, at \*9 (Ill. Dec. 17, 2015).

<sup>57</sup> *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960) ("The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); *see also* *AT&T Techs v. Communs. Workers of Am.*, 475 U.S. 643, 648 (1986) ("This [contract law] axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.").

<sup>58</sup> *See, e.g.*, *Am. Arbitrations Ass'n*, 866 N.E.2d at 301 (requiring parties to "clear[ly] have agreed to arbitrate" the issue); *see also* *Acting Superintendent of Sch. of Liverpool Cent. Sch. Dist. v. United Liverpool Faculty Ass'n*, 369 N.E.2d 746, 748 (N.Y. 1977) ("[P]arties will not be held to have chosen arbitration as the forum for the resolution of their disputes in the absence of an express, unequivocal agreement to that effect; absent such an explicit commitment neither party may be compelled to arbitrate.").

<sup>59</sup> *See United Steelworkers of America*, 363 U.S. at 582-83.

<sup>60</sup> *See, e.g.*, *Board of Educ. v. Watertown Educ. Ass'n*, 710 N.E.2d 1064, 1070 (N.Y. 1999).

<sup>61</sup> *See generally* Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84 A.L.R. 3d 242 (2016); *Sch. Dist.*, 199 N.W.2d at 759 (explaining that managerial prerogatives and matters of public policy are not negotiable).



arbitration in their CBA<sup>62</sup> or excluded by state law.<sup>63</sup> Education policy also falls outside the realm of arbitration.<sup>64</sup> Public school education is a state creation,<sup>65</sup> and thus the public's interest and welfare weighs heavily when courts decide whether a matter is subject to arbitration.<sup>66</sup>

### III. ARBITRATING SCHOOL DISCIPLINARY MATTERS

Disciplinary issues are arbitrable in certain jurisdictions.<sup>67</sup> This section will focus on these jurisdictions. For purposes of this article, educator misconduct in school settings is characterized into two broad categories: (1) in-school misconduct unrelated to students, for example, failing to follow a supervisor's directives; or (2) student-related misconduct, for example, pushing a student against the wall. Because this article focuses primarily on arbitrable disciplinary matters arising out of an educator's student-related misconduct, this section will focus on judicial decisions regarding this type of misconduct. Moreover, this section will primarily, but not exclusively, include Massachusetts and Pennsylvania cases to illustrate the issue. This is not because such cases are particular only to Pennsylvania and Massachusetts. Rather, the choice is due to Pennsylvania's noteworthy educator reinstatements and Massachusetts' legislative developments.<sup>68</sup> Because the issue of

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<sup>62</sup> See, e.g., *Karetnikova v. Tr. Of Emerson Coll.*, 725 F. Supp. 73, 76 (D. Mass 1989) (explaining that, as per the contract, procedural issues were subject to arbitration and substantive issues could be brought in court); *Sacred Heart Teachers' Ass'n v. Sacred Heart High Sch. Corp.*, 782 A.2d 227, 230 (Conn. App. Ct. 2001) (holding that nonrenewal of temporary employees was not arbitrable because the contract left the final determination to the superintendent).

<sup>63</sup> See, e.g., *Bd. of Educ. of Chi.*, 2015 Ill. LEXIS 1509, at \*28 (explaining that a school district is not obligated to arbitrate matters not arbitrable under state law); see also *Chicago Teachers Union, Local No. 1 v. Ill. Educ. Labor Relations Bd.*, 778 N.E.2d 1232, 1236 (Ill. App. Ct. 2002) (noting that matters "that cannot be the subject of a collective bargaining agreement also cannot be arbitrated.").

<sup>64</sup> See, e.g., *Sch. Comm. of Boston v. Boston Teachers Union*, 363 N.E.2d 485, 490 (Mass. 1977) ("[In cases] in which the ingredient of educational policy is so comparatively heavy . . . even voluntary arbitration would be excluded."); see also *Reg'l Sch. Unit No. 5 v. Coastal Educ. Ass'n*, 121 A.3d 98, 102-05 (Me. 2015) (The court rejected the arbitrators' holding because the matter arbitrated, whether teachers were contractually required to be in their classrooms, was a matter of educational policy. The court held that teachers were required to be in their classrooms at certain times as a matter of educational policy because the teachers' presence promotes student safety, among other reasons.).

<sup>65</sup> See *infra* note 171.

<sup>66</sup> See generally Rapp, *supra* note 22, § 7.01; *United Teachers of Los Angeles v. Los Angeles Unified Sch. Dist.*, 278 P.3d 1204, 1207 (Cal. 2012); *Bd. of Educ. of Chi.*, 2015 Ill. LEXIS, at \*1; *Raines v. Indep. Sch. Dist. No. 6*, 796 P.2d 303, 303 (Okla. 1990); *Central Falls Sch. Dist. Bd. of Tr. v. Central Falls Teachers Union*, No. PC 2014-6275, 2015 R.I. Super. LEXIS 110, at \*1 (Super. Ct. R.I. Aug. 28, 2015).

<sup>67</sup> See Rapp, *supra* note 22, § 7.01; but see *Roger Williams Univ. Faculty Ass'n v. Roger Williams Univ.*, 14 F. Supp. 3d 27, 28 (D.R.I. 2014) (holding that a university faculty disciplinary matter was not arbitrable).

<sup>68</sup> See MASS. GEN. LAWS ch. 71, § 42 (LexisNexis 2016).

children's rights is a present concern regarding the current arbitrability of disciplinary matters, this section will only discuss arbitration cases available from 2000 onward.

### *A. Contemporary Examples of Arbitral Awards and Judicial Review*

Judicial review of arbitral awards provides limited but valuable insight into the traditionally-private arbitration proceedings.<sup>69</sup> Arbitral awards remain subject to judicial review, for example, to confirm or vacate an award.<sup>70</sup> These awards may not be representative of all arbitral awards because most awards are private.<sup>71</sup> But as illustrated below, these awards offer insight into trends in arbitral proceedings and judicial review of arbitral proceedings.

As exemplified in this section, within the last fifteen years, arbitration awards in the public labor relations context have been largely favorable to employees facing adverse employment consequences. Some court opinions have focused on the protection of the public welfare.<sup>72</sup> However, as illustrated below, most of the analysis addressed children's rights vicariously, not directly. Two themes were prevalent. First, in cases where the educators' misconduct was physical in nature, the arbitrators often reinstated the educators and the courts upheld the arbitrators' awards. Second, in cases where the educators' misconduct was sexual in nature, the arbitrators often reinstated the educators but, depending on the severity of the sexual misconduct and the amount of evidence weighing against the educators, the courts overturned the arbitrators' awards.

#### *1. Physical Misconduct*

The survey of the cases yielded cases in which educators used physical force against students, and the arbitrators and courts often reinstated the educators. In the first case, *School District of Kewaskum v. Kewaskum Education Association*, the school district terminated a special education teacher's employment after several students complained that she used excessive physical force against four students.<sup>73</sup> The arbitrator, as the fact-finder, determined that the substantiated physical contact was permissible and incidental.<sup>74</sup> Relying heavily on the arbitrator's findings, the court held that the arbitrator's award did

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<sup>69</sup> See *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 518 (3d Cir. 2013) ("Confidentiality is a natural outgrowth of the status of arbitrations as private alternatives to government-sponsored proceedings.").

<sup>70</sup> 9 U.S.C. §§ 10, 11 (2016).

<sup>71</sup> See *Del. Coal. for Open Gov't*, 733 F.3d at 518.

<sup>72</sup> See, e.g., *Neshaminy Sch. Dist. v. Neshaminy Fed'n of Teachers*, No. 2015-04458, 2016 Pa. Dist. & Cnty. Dec. LEXIS 185, \*20-28 (Pa. C.P. May 4, 2016).

<sup>73</sup> *Sch. Dist. of Kewaskum v. Kewaskum v. Educ. Ass'n*, 840 N.W.2d 719, 721 (Wis. Ct. App. 2013).

<sup>74</sup> *Id.* at 722.

not violate the law or public policy, was not immoral and did not lead to an environment that endangered the students' mental or physical well-being because the contact was permissible and incidental.<sup>75</sup>

In a second case, *Rose Tree Media Secretaries & Educational Support Personnel Ass'n v. Rose Tree Media School District*, the arbitrator reinstated a special education teacher who dragged a special needs student from outside the classroom to his desk because the student did not want to enter the classroom.<sup>76</sup> The arbitrator found the situation to be a reprehensible one-time incident that did not violate public policy and was outweighed by the teacher's track record.<sup>77</sup> The court held that the arbitrator derived its decision from the essence of the CBA, and the arbitral award did not violate public policy.<sup>78</sup>

In a third case, *Mayberry v. DOD Dependents Schools Europe*, the school terminated a first grade teacher after a parent complained that the teacher had harmed a student when the teacher lifted the student by the arms, pulling the student forcibly away from the student's chair.<sup>79</sup> Some students used the words "grabbed," "yanked," "shook," and "hit" to describe what the teacher continuously did to other students.<sup>80</sup> But, other students claimed to adore the teacher.<sup>81</sup> The teacher admitted some of the allegations to the arbitrator, who upheld the teacher's dismissal.<sup>82</sup> The court, however, reinstated the teacher because the CBA's contractual terms required progressive discipline of teachers.<sup>83</sup> The three cases described in this section illustrate the potential difficulty for school districts to dismiss educators in cases involving the use of physical force.

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<sup>75</sup> *Sch. Dist. of Kewaskum*, 840 N.W.2d at 724. Although the opinion does not detail the behavior at issue, the Milwaukee, Wisconsin Journal Sentinel, a local online news medium, reported that the children alleged the teacher pinched students' necks and shoulder areas, pulled the students' arms, and pushed children into their chairs. See Arthur Thomas, *Kewaskum School District Asks Court to Uphold Teacher's Firing*, MILWAUKEE WISCONSIN, JOURNAL SENTINEL (July 13, 2012), <http://archive.jsonline.com/news/ozwash/kewaskum-school-district-asks-court-to-uphold-teachers-firing-vr6486t-162424116.html?page=1>.

<sup>76</sup> *Rose Tree Media Sec'y's & Educ. Support Pers. Ass'n v. Rose Tree Media Sch. Dist.*, 136 A.3d 1069, 1072 (Pa. Commw. Ct. 2016).

<sup>77</sup> *Rose Tree Media Sec'y's & Educ. Support Pers. Ass'n*, 136 A.3d at 1074.

<sup>78</sup> *Id.* at 1080.

<sup>79</sup> *Mayberry v. DOD Dependents Schs. Eur.*, 500 Fed. Appx. 935, 936 (Fed. Cir. 2013).

<sup>80</sup> *Id.* at 937.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 938-41.

<sup>83</sup> *Id.* at 940.

## 2. Sexual Misconduct

The cases involving sexually-related misconduct varied by severity based on whether the educator in any given case had direct contact with the students, had multiple allegations of sexual misconduct, or showed remorse. The three features were not mutually exclusive. For example, in *Cedar Education Association v. Cedarburg Board of Education*,<sup>84</sup> the Wisconsin Appellate Court reversed the trial court's confirmation of an arbitral award reinstating a teacher who watched pornographic material during school hours on a school computer.<sup>85</sup> Even though the educator did not come into sexual contact with the students, the educator's behavior was likely contrary to what students and parents expected from a school teacher and role model.<sup>86</sup> While the arbitrator found that a single incident in an otherwise unblemished eleven-year career did not merit dismissal,<sup>87</sup> the Appellate Court reasoned that when a teacher engages in immoral behavior on school grounds, which violates public policy, the court must vacate the arbitral award pursuant to state law.<sup>88</sup> The statute mandated that the court vacate an award when the arbitrator has exceeded his powers, and here the arbitrator exceeded his powers when he issued an award in violation of public policy.<sup>89</sup>

Similarly, in 2001, in *Fort Wayne Education Ass'n v. Fort Wayne Community Schools*, the school terminated a long-serving substitute teacher who, while supervising a basketball practice, approached a female student, placed his hands inside his shorts, and told the student that he did not like the new underwear he was wearing.<sup>90</sup> A few minutes later, he proceeded to tell her that he wanted to show her something "cool" but that she could not tell her parents, and then showed her his pierced nipple.<sup>91</sup> He eventually

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<sup>84</sup> *Cedarburg Educ. Ass'n v. Cedarburg Bd. of Educ.*, No. 2007AP852, 2008 Wisc. App. LEXIS 560, at \*1 (Wis. Ct. App. July 23, 2008).

<sup>85</sup> *Id.* at \*11.

<sup>86</sup> See, e.g., *Parent, Student, and Teacher Expectations*, TUSCANO ELEMENTARY SCH., [http://tusc.fesd.org/staff\\_websites/special\\_education/mrs\\_\\_czoka/parent\\_\\_student\\_\\_and\\_teacher\\_expectations/](http://tusc.fesd.org/staff_websites/special_education/mrs__czoka/parent__student__and_teacher_expectations/) (last visited May 7, 2017) ("Teachers are expected to help students by: . . . showing that they care about all students, having high expectations for themselves and students, [and] providing a safe and supportive learning environment."); *Teachers as Role Models*, TEACH, <https://teach.com/what/teachers-change-lives/teachers-are-role-models/> (last visited May 7, 2017) ("A role model can be anybody: a parent, a sibling, a friend but some of our most influential and life-changing role models are teachers.").

<sup>87</sup> *Cedarburg Educ. Ass'n*, 2008 Wisc. App. LEXIS 560, at \*12.

<sup>88</sup> *Id.* at \*14; WIS. STAT. ANN. § 788.10 (West 2016).

<sup>89</sup> *Cedarburg Educ. Ass'n*, 2008 Wisc. App. LEXIS 560, at \*14.

<sup>90</sup> *Fort Wayne Educ. Ass'n v. Fort Wayne Cmty. Sch.*, 753 N.E.2d 672, 674 (Ind. Ct. App. 2001).

<sup>91</sup> *Id.*

apologized for making her feel uncomfortable.<sup>92</sup> The arbitrator reinstated him, concluding that the penalty was too severe for the misconduct.<sup>93</sup> The Appellate Court determined that the arbitrator did not modify the CBA, exceeding his powers<sup>94</sup> in violation of state law,<sup>95</sup> and did not manifestly disregard the law by concluding that the substitute teacher did not act immorally.<sup>96</sup> Rather, the arbitrator simply interpreted the school code as best the arbitrator could.<sup>97</sup> Here, the misconduct, while inappropriate, did not constitute sexual harassment as defined in the school code.<sup>98</sup> Therefore, the substitute's reinstatement on the middle school's list of available substitute teachers and partial back pay was merited.<sup>99</sup> The court in *City School District of the City of New York v. McGraham* also reinstated the educator, upholding an arbitral award, which suspended but did not terminate a high school teacher who had attempted to pursue an intimate relationship with one of her students,<sup>100</sup> because she expressed remorse and willingness to change.<sup>101</sup> The dissenting judge expressed his concern about returning the teacher to school because this would pose a risk to future students.<sup>102</sup> The court in *Neshaminy School District v. Neshaminy Federation of Teachers*, reached an opposite outcome and held that the arbitral award reinstating a teacher who used sexually-charged language toward his teaching assistant in front of his

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<sup>92</sup> *Id.*

<sup>93</sup> *Fort Wayne Educ. Ass'n*, 753 N.E.2d at 675.

<sup>94</sup> *Id.* at 677 (The trial court held the arbitrator modified the CBA by precluding the teacher's termination under any circumstance. The Appellate court reversed.).

<sup>95</sup> IND. CODE ANN. § 34-57-2-13(a) (LexisNexis 2016) (providing narrow grounds for vacating an award when the arbitrator exceeds his or her powers).

<sup>96</sup> *Fort Wayne Educ. Ass'n*, 753 N.E.2d. at 679 (“[The substitute teacher’s] conduct, as explained above, was an isolated incident--not a course of conduct. Moreover, it does not rise to the level of conviction for any offense, let alone the serious sex offenses listed in Indiana Code section 20-6.1-4-10(a)(6) and cited by [the school]. The arbitrator did not manifestly disregard the law in concluding that [the substitute teacher’s] conduct was not immoral.”).

<sup>97</sup> *Fort Wayne Educ. Ass'n*, 753 N.E.2d at 677.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 680 (The Appellate Court ordered the substitute teacher's reinstatement only on the list because the Court found that the arbitrator had exceeded his power in ordering reinstatement of the substitute teacher for the following academic year. The Court stated, “[The substitute teacher], as a long-term substitute, had no ‘rights’ or ‘security’ for the succeeding academic year, except that he not be replaced by another substitute teacher without cause.”).

<sup>100</sup> *City Sch. Dist. of the City of N.Y. v. McGraham*, 905 N.Y.S.2d 86, 90-91 (App. Div. 2010).

<sup>101</sup> *Id.* at 93.

<sup>102</sup> *Id.* at 93-97 (Acosta, J., dissenting).

students violated public policy<sup>103</sup> because sexual harassment in the workplace is not permissible<sup>104</sup> and the reinstatement would result in continued exposure to the sexually-suggestive bantering.<sup>105</sup>

The remainder of the cases involved educators who came in direct contact with the students. Some courts and arbitrators have been more willing to vacate or modify an arbitral award or school district decision when the teacher misconduct is sexually-related and sufficient evidence supports the claims.<sup>106</sup> In *Bethel Park School District v. Bethel Park Federation of Teachers*, the district terminated a seventh-grade mathematics teacher's employment after learning the teacher had engaged in inappropriate contact with several female students, holding their hands and rubbing their backs or legs when he would help them with their math homework.<sup>107</sup> The Court held that the arbitrator did not rationally derive the decision from the CBA when reinstating the teacher but rather reached his own conclusion unsupported by the CBA.<sup>108</sup> Moreover, the arbitral award violated "well-defined and established public policy of protecting students from sexual harassment during school hours, on school property" as defined in the District's policy against unlawful harassment.<sup>109</sup> This case merited the use of the narrow public policy exception.<sup>110</sup> Similarly, in *East Bridgewater [sic] Public Schools*, the school dismissed a teacher who asked a young girl to sit on his lap and then proceeded to place his hand directly on her private areas.<sup>111</sup> Even though the conduct was serious, the arbitrator warned that he would have to reinstate the teacher if he found the reinstatement would be in the best interests of the students, as required by the Massachusetts teacher dismissal statute.<sup>112</sup> However, because the District proved with substantial evidence that the teacher continued asking

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<sup>103</sup> *Neshaminy Sch. Dist.*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 185, at \*20.

<sup>104</sup> *Neshaminy Sch. Dist.*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 185, at \*21-24.

<sup>105</sup> *Id.* at \*26.

<sup>106</sup> See, e.g., *Bethel Park Sch. Dist. v. Bethel Park Fed'n. of Teachers*, 55 A.3d 154, 161-62 (Pa. Commw. Ct. 2012). Some arbitrators have gone further and not required direct evidence of current misconduct against students. For example, in *Melzer v. Bd. of Educ.*, 196 F. Supp. 2d 229, 242 (E.D.N.Y. 2002), the arbitrator terminated the high school teacher's employment after determining that the teacher's membership in the North American Man-Boy Love Association (NAMBLA), which promotes sexual activity between adult males and boys in possible violation of New York Statutes, would reasonably interfere with his ability to provide a "valid educational experience" for the students.

<sup>107</sup> *Bethel Park Sch. Dist.*, 55 A.3d at 158.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 160-61.

<sup>110</sup> *Id.* at 161.

<sup>111</sup> *East Bridgewater [sic] Public Schools*, 11-390-02251-01 (2002) (Dunn, Arb).

<sup>112</sup> MASS. GEN. LAWS ch. 71, § 42 (LexisNexis 2016).

young children to sit on his lap after being warned to stop, the teacher's misconduct outweighed the teacher's "impressive" classroom results.<sup>113</sup> In *Bonang v. New Haven Board of Education*, a Connecticut arbitrator also terminated a teacher's employment after determining that the teacher had a long history of inappropriate sexual behavior and reprimands against such behavior.<sup>114</sup> The Court affirmed the award.<sup>115</sup>

The courts in two court cases described the reinstatement of the educators, even though the educators came in direct contact with the students. First, in *D.C.G. & P.J.G. v. Wilson Area School District*, the arbitrator reinstated the teacher with back pay and benefits.<sup>116</sup> The court's analysis did not provide great detail on the arbitration proceedings because the claim before the court was a constitutional claim. However, the opinion describes allegations that he had touched a student's shoulders and neck, played with her hair, continually complimented her on her physical appearance, asked her whether she had "slept around with guys," and cupped her breasts, to name a few incidents.<sup>117</sup> Several other females came forward to make similar accusations after the first student.<sup>118</sup> Second, in *Franklin Regional School District v. Franklin Regional Education Association*, the District terminated an elementary teacher after several female students accused him of touching them while they attended his music lessons.<sup>119</sup> The arbitrator reinstated the teacher because he found the teacher more credible than the young students and because the Police department and Westmoreland County Children and Youth Services did not proceed with the case.<sup>120</sup> The cases in this section illustrate a variety of outcomes. The results vary, in part, because the claims and the claims' elements before the arbitrators and courts are different.

### *B. Discussion of Contemporary Trends in Public Relations Arbitration Proceedings*

None of the cases discussed above describe the arbitrator's direct analysis of the children's rights or the potential risk of harm to other students upon reinstatement of the

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<sup>113</sup> East Bridgewater [sic] Public Schools, 11-390-02251-01 (2002) (Dunn, Arb).

<sup>114</sup> *Bonang v. New Haven Bd. of Educ.*, No. CV094039902S, 2011 Conn. Super. LEXIS 862, at \*4, \*30 (Conn. Super. Ct. Apr. 1, 2011).

<sup>115</sup> *Id.* at \*30.

<sup>116</sup> *D.C.G. & P.J.G. v. Wilson Area Sch. Dist.*, No. 07-cv-1357, 2009 U.S. Dist. LEXIS 26446, at \*7 (E.D. Pa. Mar. 25, 2009).

<sup>117</sup> *Id.* at \*5.

<sup>118</sup> *Id.* at \*6.

<sup>119</sup> *Franklin Reg'l Sch. Dist. v. Franklin Reg'l Educ. Ass'n*, No. 114 C.D. 2015, No. 147 C.D. 2015, 2016 Pa. Commw. Unpub. LEXIS 33, at \*3-5. (Pa. Commw. Ct. Jan. 7, 2016).

<sup>120</sup> *Id.* at \*5.

teachers.<sup>121</sup> Instead, the cases presented above illustrate the arbitrators' willingness to reinstate teachers subject to disciplinary proceedings if the teachers have no prior disciplinary records.<sup>122</sup> The analyses sometimes focus on whether the districts followed the proper disciplinary procedures outlined in the CBA<sup>123</sup> and, if so, whether reinstatement would violate a well-defined public policy.<sup>124</sup>

The cases presented above represent the cases in which reinstatement is difficult.<sup>125</sup> While the educator may have behaved inappropriately, in some cases, the educator has an exemplary track record.<sup>126</sup> The cases also demonstrate that CBAs often require progressive discipline (e.g., providing warnings, an opportunity to improve, and short suspensions) and other notification requirements (e.g., providing a written letter notifying the teacher of the charges) prior to full employment termination.<sup>127</sup> Notwithstanding the CBA clauses, the schools often terminate the employees after the first instance of egregious misconduct.<sup>128</sup> However difficult these cases may be, arbitrators and the courts should consider children's rights in their analyses.

Children's rights are not at the forefront of arbitration proceedings or the courts' analyses of educators' dismissal disputes, but are rather an afterthought, if present at all. Largely, neither the arbitrator nor the courts directly consider the risk to students when reinstating a teacher who has engaged in serious student-related misconduct.<sup>129</sup> First, the arbitrators' analyses focus on the CBA and whether the educator violated the school code

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<sup>121</sup> See discussion *supra* Section III.A (discussing the arbitrators' and courts' analyses, none of which included direct extensive discussions on children's rights or the potential risk to other students upon reinstatement).

<sup>122</sup> E.g., *Rose Tree Media Sec'y's & Educ. Support Pers. Ass'n*, 136 A.3d at 1074.

<sup>123</sup> E.g., *Mayberry*, 500 Fed. Appx. at 940.

<sup>124</sup> See *Neshaminy Sch. Dist.*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 185, at \*20; *Cedarburg Educ. Ass'n*, 2008 Wisc. App. LEXIS 560, at \*14; *Sch. Dist. of Kewaskum*, 840 N.W.2d at 724; *Rose Tree Media Sec'y's & Educ. Support Pers. Ass'n*, 136 A.3d at 1080; *Bethel Park Sch. Dist.*, 55 A.3d at 160-61.

<sup>125</sup> See generally discussion *supra* Section III.A.

<sup>126</sup> E.g., *Rose Tree Media Sec'y's & Educ. Support Pers. Ass'n*, 136 A.3d at 1074; *Cedarburg Educ. Ass'n*, 2008 Wisc. App. LEXIS 560, at \*12.

<sup>127</sup> E.g., *Mayberry*, 500 Fed. Appx. at 940.

<sup>128</sup> *Sch. Dist. of Kewaskum*, 840 N.W.2d at 721; *Rose Tree Media Sec'y's & Educ. Support Pers. Ass'n*, 136 A.3d at 1072; *Mayberry*, 500 Fed. Appx. at 938; *City Sch. Dist. of the City of N.Y.*, 905 N.Y.S.2d at 89-90; *Neshaminy Sch. Dist.*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 185, at \*2; *Bethel Park Sch. Dist.*, 55 A.3d at 158; East Bridgewater [sic] Public Schools, 11-390-02251-01 (2002) (Dunn, Arb); *Bonang*, 2011 Conn. Super. LEXIS 862, at \*4, \*30; *Wilson Area Sch. Dist.*, 2009 U.S. Dist. LEXIS 26446, at \*7; *Franklin Reg'l Sch. Dist.*, 2016 Pa. Commw. Unpub. LEXIS 33, at \*3-5.

<sup>129</sup> See discussion *supra* Section III.A (describing the issues the arbitrators and courts considered in these cases and illustrating that arbitrators and judges generally do not fully consider the risk posed to other students upon the educators' reinstatement).



or any other statutory mandates<sup>130</sup> or whether the district has sufficient grounds, or just cause, to terminate the employee.<sup>131</sup> Generally, the just cause requirement demands more than a single incident, even if the incident is egregious.<sup>132</sup> Second, the cases above demonstrate that the courts, in reviewing arbitral awards, have largely remained deferential to arbitration awards, vacating awards only on limited occasions, such as when the award contravenes a narrowly-defined public policy.<sup>133</sup>

Public policy and other related exceptions<sup>134</sup> offer the only opportunities for arbitrators and courts to consider the children's rights, but these exceptions are not enough. For example, in Pennsylvania, a court reviewing an arbitral award in a teacher dismissal case due to in-school, student-related misconduct is primarily concerned with whether the arbitral award rationally flows from the CBA.<sup>135</sup> In other words, the court first determines whether the arbitrator interpreted the contract properly and whether the arbitrator exceeded his or her power as granted by the CBA. It is only after this analysis that the court determines whether the arbitral award violates public policy.<sup>136</sup> In addition, the public policy must be well-defined, not simply represent normative value judgments of what should be considered public policy.<sup>137</sup> The cases show that this is a difficult burden to meet.<sup>138</sup> Moreover, even when the parties meet the burden, the public policy analysis tends to focus on how the reinstatement of the teacher would affect the workplace environment, not how the reinstatement would affect the children under the educator's care.<sup>139</sup> If the

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<sup>130</sup> See, e.g., *Fort Wayne Educ. Ass'n*, 753 N.E.2d. at 677-79.

<sup>131</sup> E.g., *Rose Tree Media Sec'ys & Educ. Support Pers. Ass'n*, 136 A.3d at 1073-75.

<sup>132</sup> *Rose Tree Media Sec'ys & Educ. Support Pers. Ass'n*, 136 A.3d at 1080-81.

<sup>133</sup> See, e.g., *Cedarburg Educ. Ass'n*, 2008 Wisc. App. LEXIS 560, at \*14; *Neshaminy Sch. Dist.*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 185, at \*20.

<sup>134</sup> See, e.g., *Fort Wayne Educ. Ass'n*, 753 N.E.2d. at 679 (discussing "manifest disregard of the law" as an exception to upholding arbitral awards).

<sup>135</sup> See, e.g., *Colonial Intermediate Unit #20*, 2015 Pa. Commw. Unpub. LEXIS 103, at \*10-21.

<sup>136</sup> See, e.g., *id.* at \*21-31; *Rose Tree Media Sec'ys & Educ. Support Pers. Ass'n*, 136 A.3d at 1071.

<sup>137</sup> See, e.g., *Colonial Intermediate Unit #20*, 2015 Pa. Commw. Unpub. LEXIS 103, at \*10; *Sch. Dist. of Kewaskum*, 840 N.W.2d at 722; *Rose Tree Media Sec'ys & Educ. Support Pers. Ass'n*, 136 A.3d at 1071; *Cedarburg Educ. Ass'n*, 2008 Wisc. App. LEXIS 560, at \*7-8; *Neshaminy Sch. Dist.*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 185, at \*17-18, 20-21; *Bethel Park Sch. Dist.*, 55 A.3d at 160-61.

<sup>138</sup> See, e.g., *Colonial Intermediate Unit #20*, 2015 Pa. Commw. Unpub. LEXIS 103, at \*10; *Sch. Dist. of Kewaskum*, 840 N.W.2d at 722; *Rose Tree Media Sec'ys & Educ. Support Pers. Ass'n*, 136 A.3d at 1071; *Cedarburg Educ. Ass'n*, 2008 Wisc. App. LEXIS 560, at \*7-8; *Neshaminy Sch. Dist.*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 185, at \*17-18, 20-21; *Bethel Park Sch. Dist.*, 55 A.3d at 160-61; see also discussion *infra* Section III.C.

<sup>139</sup> See, e.g., *Neshaminy Sch. Dist.*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 185, at \*27-28 ("Appellant further complains that this Court erred in finding that the arbitration decision was a violation of a dominant public policy against immoral conduct. However, we did not make any such finding in granting Appellee's Petition

district succeeds in showing that the arbitral award violates public policy, the children will benefit. For example, a teacher who lacks self-control would no longer be in the classroom with the students.

The cases described above present an issue of focus. As discussed in this section, children's rights rarely play an important role in the analysis, and when the arbitrators or courts discuss the children's rights during arbitration or court proceedings, they often discuss the rights only minimally, as an afterthought, or only vicariously. The particular vulnerabilities of primary and secondary students and the importance of providing a safe education environment<sup>140</sup> demands that children's rights play a major role in the arbitration or judicial analysis.

The following section highlights how the judicial branch can play a strong role in reviewing arbitral awards after an arbitrator has rendered a decision. When a court directly considers the best interests of the students, the students benefit directly. However, not all arbitral awards will undergo judicial review because of arbitration's private nature.<sup>141</sup>

### *C. Recent Developments in the Public School Labor Relations Context*

Recent developments in different states are beginning to shape the interpretation of public employer-employee contractual relations in arbitration cases. Some states have taken a strong stance, prohibiting collective bargaining of public employee disciplinary matters or granting public employers the right to not bargain disciplinary matters if the employers so desire.<sup>142</sup> In contrast, Massachusetts has adopted a teacher dismissal

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and thereby vacating the arbitration award. The arbitration award was vacated solely due to its unacceptable risk of violating a dominant public policy against sexual harassment in the classroom . . .").

<sup>140</sup> *Bellotti v. Baird*, 443 U.S. 622, 633-34 (1979) ("[Children have the] inability to make critical decisions in an informed mature manner . . ."); *Eddings v. Okla.*, 455 U.S. 104, 116 (1982), *superseded by statute*, 21 Okl. S. § 701.13 (explaining that minors "lack experience, perspective, and judgment expected of adults"); *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) ("[Children] have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings.").

<sup>141</sup> *See Del. Coal. for Open Gov't*, 733 F.3d at 518 ("Confidentiality is a natural outgrowth of the status of arbitrations as private alternatives to government-sponsored proceedings.").

<sup>142</sup> *See, e.g.*, WIS. STAT. § 111.70 (4) (mb) (2017) (The statute states, in pertinent part, "The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a general municipal employee with respect to the following: 1. Any factor or condition of employment except wages . . ."); OHIO REV. CODE ANN. § 4117.08 (C)(5) (LexisNexis 2017) ("Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117 of the Revised Code impairs the right and responsibility of each public employer to: . . . (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees . . ."); CAL. GOV'T CODE § 3543.2(b) (Deering 2017) ("[T]he public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding causes and procedures for disciplinary action, *other than dismissal*, including suspension of pay for up to 15 days, affecting certificated employees.") (emphasis added); D.C. CODE § 1-617.08 (a)(2)-(3), (a-1) (2017) ("The respective personnel authorities (management) shall retain the sole right, in accordance with applicable law and rules and regulations: . . . (2) to hire, promote, transfer, assign, retain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary action against employees for cause; (3) To relieve employees of duties because of lack of work or other legitimate reasons . . . (a-1) An act, exercise, or agreement of the respective personnel

statute.<sup>143</sup> The statute allows district superintendents to dismiss teachers and provides the procedures that the district must follow when dismissing the district employee.<sup>144</sup> The practical effects of the statute have proven effective vis-à-vis children's rights because the statute requires that the arbitrator "consider the best interests of the pupils."<sup>145</sup> Moreover, judicial review of the teacher dismissal statute is less deferential than the review of arbitral awards arising out of the CBAs because the Court has the jurisdiction to interpret statutes *de novo*.<sup>146</sup> Within the last fifteen years, after the enactment of the statute, the Massachusetts courts' judicial review of arbitral awards has shifted toward an emphasis on the children's best interests, as illustrated in the following two cases.<sup>147</sup>

In *School District v. Geller*, the principal suspended the teacher for "conduct unbecoming a teacher" after determining that, on three separate occasions, the teacher pushed three students against the wall while screaming at the students.<sup>148</sup> The arbitrator described the behavior as inappropriate, but after considering the teacher's twenty years of experience, lack of prior disciplinary record, and previous positive evaluations, concluded that the teacher should be reinstated because reinstatement was in the "best interests" of the students.<sup>149</sup>

The judges in the Supreme Court of Massachusetts did not write a majority opinion.<sup>150</sup> Instead, the judges on the Court wrote two concurrences offering the following two distinct focuses: (1) the teacher dismissal statute, and (2) the violation of public

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authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights . . .").

<sup>143</sup> MASS. GEN. LAWS ch. 71, § 42 (LexisNexis 2016).

<sup>144</sup> § 42.

<sup>145</sup> See, e.g., *Sch. Dist. v. Geller*, 755 N.E.2d 1241, 1250 (Mass. 2001).

<sup>146</sup> *Id.* at 1246 ("Where the determinations to be made are primarily issues of public law, the arbitrator possesses no special expertise. Hence, the responsibility for interpreting the meaning of [the statute], and the scope of the arbitrator's authority thereunder remains with the court. It cannot be ceded to the arbitrator by agreement of the parties, and has not been ceded to the arbitrator in the statute.") (internal citations omitted).

<sup>147</sup> *Geller*, 755 N.E.2d 1241; *Sch. Comm. of Lexington v. Zagaeski*, 12 N.E.3d 384 (Mass. 2014). Cf. *City of Worcester v. Worcester Vocational Teachers Ass'n*, No. 98-1686B, 1999 Mass. Super. LEXIS 75, at \*5 (Mass. Super. Ct. 1999) (noting the deferential standard when reviewing arbitral awards, the Court dismissed the city and school's complaint and reemphasized that "[a]bsent fraud, the court's inquiry is confined to the question [of] whether the arbitrator exceeded the scope of his reference or awarded relief in excess of his authority." (quoting *Sch. Comm. of Waltham v. Waltham Educators Ass'n*, 500 N.E.2d 1312, 1314 (Mass. 1986))).

<sup>148</sup> *Geller*, 755 N.E.2d at 1243 (Cordy, J., concurring).

<sup>149</sup> *Id.* at 1244.

<sup>150</sup> See generally *id.*

policy.<sup>151</sup> Judge Cordy, in the first concurrence, argued that the arbitral award violated the dismissal statute.<sup>152</sup> Judge Cordy recognized that the arbitrator derived his authority from the CBA, but emphasized that the authority to arbitrate a teacher dismissal case now derives from the statute.<sup>153</sup> Judge Cordy explained that the arbitrator exceeded his authority when the arbitrator weighed the teacher's experience against the severity of the punishment because the statute provides a list of grounds for dismissal that do not permit additional analysis.<sup>154</sup> Judge Cordy further noted: "to improve the education provided to the students in the classrooms of our public schools . . . [The] statute is not only about the relationship between the employer and employee, it is about the education of students."<sup>155</sup>

In the second concurrence, Judge Ireland asserted that the award should be vacated because the award violated public policy.<sup>156</sup> Massachusetts has a strong public policy against teachers using physical force against students. Judge Ireland explained that the reinstatement was not merited because the teacher "pushed, shoved, jabbed, dragged, knocked down, . . . slammed into a locker," and bruised three sixth-graders. Judge Ireland remained cognizant of the strong policy requiring the Court to remain "heav[ily]" deferential to arbitration awards, avoiding the "judicializ[ation]" of the arbitration process. But, Judge Ireland explained that Massachusetts has a strong policy to protect the children of Massachusetts, and the teacher's conduct was antithetical to his duties as a teacher; accordingly, the misconduct violated the public policy.<sup>157</sup>

Judge Ireland emphasized several key points. The teacher's misconduct went directly to the crux of the teacher's duties because the teacher is tasked with creating a safe environment conducive to student growth.<sup>158</sup> The reinstatement of a teacher who used physical force against his students would be absolutely inappropriate.<sup>159</sup> Judge Ireland condemned the teacher reinstatement stating, "Where the court must balance two competing policies, i.e., one favoring arbitration and one protecting our children, I do not hesitate to conclude that the latter outweighs the former."<sup>160</sup>

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<sup>151</sup> *Id.* at 1241-52.

<sup>152</sup> MASS. GEN. LAWS ch. 71, § 42 (LexisNexis 2016).

<sup>153</sup> *Geller*, 755 N.E.2d at 1245.

<sup>154</sup> *Id.* at 1247-48.

<sup>155</sup> *Id.* at 1250.

<sup>156</sup> *Id.* at 1251.

<sup>157</sup> *Id.* at 1252.

<sup>158</sup> *Geller*, 755 N.E.2d at 1252.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

In 2014, the Massachusetts Supreme Judicial Court addressed the scope of the arbitrator's authority under the teacher dismissal statute in *School Committee of Lexington v. Zagaeski*.<sup>161</sup> In *Zagaeski*, the Court vacated the arbitral award that reinstated a teacher who jokingly told his female student that she could not pay for better grades with anything else other than sexual favors.<sup>162</sup> The Court emphasized that teachers hold an important position of public trust and children rely on adults to use sound judgment, draw appropriate boundaries when necessary,<sup>163</sup> and have a right to be free from sexual harassment.<sup>164</sup> Returning the teacher to the classroom would be at odds with the purpose of the statute to create an educational setting in which students' self-esteem is protected.<sup>165</sup> Moreover, a teacher has the duty to prepare children to become responsible citizens in a democracy, and a student who witnesses sexual harassment in the classroom may learn that such conduct is not only acceptable, but should be modeled.<sup>166</sup> Here, the arbitrator erred because the statute required that when determining whether to dismiss a teacher who creates an unsafe environment for the students, the arbitrator must consider the "best interests of the pupils," not the teacher's track record.<sup>167</sup> The District rightfully dismissed him.<sup>168</sup>

These Massachusetts cases illustrate how judicial review can allow courts to consider the best interests of the students after the arbitrator has rendered an award. This trend in Massachusetts deviates from the traditional deferential review of arbitral awards as illustrated in *Section III.A*,<sup>169</sup> but is justified because the primary and secondary education field is of a *sui generis* nature.<sup>170</sup>

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<sup>161</sup> *Zagaeski*, 12 N.E.3d at 386.

<sup>162</sup> *Zagaeski*, 12 N.E.3d at 386.

<sup>163</sup> *Id.* at 396.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 396 ("[The teacher's] conduct undermined these policies, as well as one of the central purposes of the Reform Act: to ensure an educational setting that safeguards, rather than warps, a child's self-esteem."); MASS. ANN. LAWS ch. 69, § 1 (LexisNexis 2017) ("It is therefore the intent of this title to ensure: . . . (1) that each public school classroom provides the conditions for all pupils to engage fully in learning as an inherently meaningful and enjoyable activity without threats to their sense of security or self-esteem . . .").

<sup>166</sup> *Zagaeski*, 12 N.E.3d at 396.

<sup>167</sup> *Id.* at 398.

<sup>168</sup> *Id.*

<sup>169</sup> See discussion *supra* Section III.A.

<sup>170</sup> See discussion *infra* Section IV.

#### IV. CHILDREN’S RIGHTS IN PUBLIC SCHOOL ARBITRATION AGREEMENTS

##### *A. Primary and Secondary Education as a Sui Generis Sphere*

Given that the United States Constitution does not explicitly mention education, the states are primarily responsible for regulating matters related to education.<sup>171</sup> Today, all states not only provide primary and secondary public school education for all school-age children, but have compulsory attendance laws.<sup>172</sup> In 2008, children in public schools spent an average of 6.64 hours per day at school, or 1,195 hours.<sup>173</sup> Some have categorized education as the most important government duty.<sup>174</sup>

##### *1. Children Have Special Characteristics Rendering Them Vulnerable*

The law has traditionally regarded children as a population that requires special considerations.<sup>175</sup> In *Bellotti v. Baird*, the Supreme Court succinctly stated:

Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State’s duty towards children. The unique role in our society of the family, the institution by which “we inculcate and pass down many of our most cherished values, moral and cultural,” requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.<sup>176</sup>

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<sup>171</sup> U.S. CONST. amend. X. (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

<sup>172</sup> See generally Marga Mikulecky, *50-State Analysis, School Attendance Age Requirements*, EDUC. COMM’N OF THE STATES 1, <http://www.ecs.org/clearinghouse/01/07/03/10703.pdf> (last visited May 16, 2017) (listing the compulsory attendance laws for each state and the District of Columbia).

<sup>173</sup> *Average Number of Hours in the School Day and Average Number of Days in the School Year for Public Schools, by State: 2007-08*, NATIONAL CENTER FOR EDUCATION STATISTICS, SCHOOLS AND STAFFING SURVEY (SASS), [https://nces.ed.gov/surveys/sass/tables/sass0708\\_035\\_s1s.asp](https://nces.ed.gov/surveys/sass/tables/sass0708_035_s1s.asp) (last visited Sept. 16, 2016).

<sup>174</sup> See generally Rapp, *supra* note 22, § 7.01.

<sup>175</sup> See generally *Bellotti*, 443 U.S. at 633.

<sup>176</sup> *Bellotti*, 443 U.S. at 633-34 (internal citations omitted).

In 1982, the United States Supreme Court reemphasized the vulnerability of children when deciding *Eddings v. Oklahoma*, explaining that “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.”<sup>177</sup> In 2012, the Supreme Court again noted the vulnerability of children.<sup>178</sup> In *Miller v. Alabama*, the Court first recognized that children “lack . . . maturity” and have an “underdeveloped sense of responsibility.”<sup>179</sup> The Court then noted that “children ‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[l] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings.”<sup>180</sup> Finally the Court noted that “a child’s character is not as ‘well formed’ as an adult’s.”<sup>181</sup>

These cases are illustrative of the law’s view of children. Children are a special population with particular vulnerabilities attributed to the children’s underdevelopment. Their vulnerabilities and underdevelopment make them dependent on their caregivers, for protection from harm and child rearing.<sup>182</sup> As discussed below, the schools that children attend owe children certain responsibilities.

## 2. *School In Loco Parentis*

The United States Supreme Court has recognized that schools act in *loco parentis* when children attend school.<sup>183</sup> This does not mean that the school has a constitutional

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<sup>177</sup> *Eddings*, 455 U.S. at 116.

<sup>178</sup> See generally *Miller*, 132 S. Ct. 2455.

<sup>179</sup> See *id.* at 2464.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See generally *Bellotti*, 443 U.S. 622.

<sup>183</sup> See *T.L.O.*, 469 U.S. at 336; *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654-55 (1995) (“Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents and guardians. See 59 Am. Jur. 2d, Parent and Child § 10 (1987). When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them. . . . [A] parent ‘may . . . delegate part of his parental authority, during part of his parental authority, during his life, to the tutor or schoolmaster of his child.’”); *Brooks v. Logan*, 903 P.2d 73, 79 (Idaho 1995) (“[T]he role of the state to the children in school . . . is a role described as one *in loco parentis*.”); *Eisel v. Bd. of Educ.* 597 A.2d 447, 451-52 (Md. 1991) (“[T]he relations of a school vis a vis a pupil is analogous to one who stands in loco parentis, with the result that a school is under a special duty to exercise reasonable care to protect a pupil from harm.” (quoting *Lunsford v. Bd. of Educ.*, 374 A.2d 1162, 1168 (Md. 1977))).

“duty to protect” the children.<sup>184</sup> Rather, the children’s rights in the school context are restricted by the school’s interest in control over the students and safety for all.<sup>185</sup> Schools do not simply substitute the parents’ role along with all duties and responsibilities.

Primary and secondary educators play a special role during the school hours when they have direct contact with children.<sup>186</sup> In *Cobb v. W. Va Human Rights*, West Virginia’s Supreme Court of Appeals explained the principle: “[T]eachers are not merely instructors in sciences and letters. They are authority figures, role models, behavioral examples, surrogate parents.’ . . . [W]e hold, West Virginia public school teachers and school administrators stand in *loco parentis* to their students.”<sup>187</sup>

The vulnerability and mental underdevelopment of these children warrants the categorization of primary and secondary education as a *sui generis* sphere. Primary and secondary public school students become vulnerable third parties of public employer-employee arbitration disputes if the educator returns to the classroom with the students. The students’ vulnerable position implies that safeguards such as the ones detailed in the next section must be in place to protect students.

#### *B. Children as Third Party Recipients of School-Educator Arbitration Agreements Vis-à-vis Discipline Matters*

Upon review of the children’s vulnerabilities<sup>188</sup> and the school’s in *loco parentis* role during school hours,<sup>189</sup> one can conclude that negative situations occurring in school settings can have a detrimental effect on students. For example, a teacher who continuously humiliates students, like the teacher in *Colonial Intermediate Unit*,<sup>190</sup> presents a special threat to the students’ the wellbeing. Although CBAs are contractual in nature, jurisdictions can implement safeguards that respect freedom of contract in a manner that is considerate of children’s rights.

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<sup>184</sup> *Vernonia Sch. Dist.*, 515 U.S. at 655.

<sup>185</sup> *Id.* at 656.

<sup>186</sup> *See generally* *Cobb v. W. Va. Human Rights Comm’n ex rel. Wattie*, 619 S.E.2d 274 (W. Va. 2005).

<sup>187</sup> *Id.* at 288.

<sup>188</sup> *See generally* *Bellotti*, 443 U.S. 622; *Eddings*, 455 U.S. 104; *Miller*, 132 S. Ct. 2455.

<sup>189</sup> *See supra* note 183.

<sup>190</sup> *Colonial Intermediate Unit #20*, 2015 Pa. Commw. Unpub. LEXIS 103, at \*2-6.



## V. WORKABLE & SUSTAINABLE SAFEGUARDS FOR SCHOOL-EDUCATOR ARBITRATION AGREEMENTS

This section will propose three major potential safeguards that can be implemented in the school-educator arbitration procedures to mitigate or avoid potential unintended, negative consequences on students after an educator is reinstated. Proposed safeguards must be both workable and sustainable to ensure success. After introducing each potential safeguard, this section will analyze the workability and sustainability of each alternative. Each potential safeguard has its strengths and weaknesses.

Recognizing that education is within the states' spheres,<sup>191</sup> and that education operates within a loose-coupling system,<sup>192</sup> this section presents the strengths and weakness of all three potential solutions and urges jurisdictions to adopt one or a combination of the three safeguards that are feasible and best account for the jurisdiction's particular needs. While the analysis presented below is comprehensive, different jurisdictions may find that the analysis is not exhaustive. Jurisdictions should weigh additional considerations not listed herein. Ultimately, the safeguard(s) adopted should be the closest to an ideal solution for the jurisdiction and should recognize and consider the children's rights. Ideally, jurisdictions will adopt the most feasible safeguard and will incrementally allocate more responsibility to other key players, namely, the judiciary and legislative branch, the arbitrators, and the public employer and employee.

### *A. Legislative and Judicial Safeguards: Independent and Concerted Efforts*

#### *1. Proposed Safeguards*

Legislatures may adopt any of the following proposals. First, the state legislatures that have not done so can enact laws that make public employees disciplinary matters non-bargainable.<sup>193</sup> Some states' legislatures have enacted laws that make certain matters non-bargainable and, consequently, non-arbitrable.<sup>194</sup> Once employee disciplinary matters become non-bargainable, a public employer has the discretion to decide how to handle

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<sup>191</sup> See U.S. CONST. amend. X.

<sup>192</sup> The term loose coupling in the education field is often used to describe the decentralized education in the United States, where each state has primary responsibility for regulating education in its state and governing school boards further execute the state's mandates independently. See Karl E. Weick, *Educational Organizations as Loosely Coupled Systems*, ADMINISTRATIVE SCIENCE QUARTERLY 1, 3 (1976), [www.jstor.org/stable/pdf/2391875.pdf](http://www.jstor.org/stable/pdf/2391875.pdf) (describing the concept of loose coupling in education).

<sup>193</sup> See, e.g., § 1-617.08 (a)(2)-(3), (a-1) (2017).

<sup>194</sup> See, e.g., WIS. STAT. § 111.70(4)(mb) (2017) (making non-bargainable any employment condition except wages); OHIO REV. CODE ANN. § 4117.08 (C)(5) (LexisNexis 2017) (giving public employers the ability to choose not to bargain disciplinary matters, including suspensions, demotions, or discharges, lay-offs, transfers, and reassignments); CAL. GOV'T CODE § 3543.2(b) (Deering 2017) (reserving dismissal decisions for the public employer and rendering such decisions non-bargainable); § 1-617.08 (a)(2)-(3), (a-1) (2017).

employee misconduct.<sup>195</sup> One approach an employer can take is to forgo progressive disciplinary proceedings and adopt zero tolerance policies when the employer perceives that the employee acted in a manner contrary to what society expects of educators.<sup>196</sup>

Second, the state legislatures can enact laws that make disciplinary matters non-arbitrable, leaving disciplinary matters outside the scope of the arbitration clause in the CBA.<sup>197</sup> This proposal differs from the first because this proposal bars arbitration but permits the possibility to still bargain employee discipline procedures. For example, both parties may bargain for and agree that a teacher who engages in sexual misconduct with a student will be immediately terminated. Because the public employee and employer are still able to bargain certain measures, the second proposal also allows the parties to retain their party autonomy.<sup>198</sup> One major caveat for this proposal is that a court may overrule a law that restricts arbitrability pursuant to the federal policy favoring arbitration.<sup>199</sup>

Third, the state legislatures can enact laws that allow public employers and employees to bargain and arbitrate employee disciplinary matters but requires that the arbitrator, and subsequently the courts, consider the best interests of the students when considering whether to reinstate an educator who has engaged in student-related misconduct.<sup>200</sup> The legislature would have to determine what boundaries are most appropriate in its jurisdiction. For example, the legislature may decide to include an enumerated list of misconduct that warrants immediate discharge. The legislatures can also model their statutes after Massachusetts's. Massachusetts's teacher dismissal statute presents an example that has served to bring the student's rights to the forefront in these type of arbitration cases.<sup>201</sup> The statute details the procedure that public employers must follow when discharging the employee.<sup>202</sup> The statute also mandates that the arbitrator

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<sup>195</sup> See TUSSEY, *supra* note 61; see generally *Sch. Dist.*, 199 N.W.2d 752; *Karetnikova*, 725 F.Supp. 73; *Sacred Heart Teachers' Ass'n*, 782 A.2d 227; *Bd. of Educ. of Chi.*, 2015 Ill. LEXIS 1509, at \*1; *Chicago Teachers Union*, 778 N.E.2d 1232.

<sup>196</sup> See, e.g., *Mayberry*, 500 Fed. Appx. 936-40.

<sup>197</sup> See *Bd. of Educ. of Chi.*, 2015 Ill. LEXIS 1509, at \*1; see generally *Chicago Teachers Union*, 778 N.E.2d 1232.

<sup>198</sup> See generally *A Practical Guide to Grievance Arbitration*, AM. BAR ASS'N 1 (Dec. 18, 2012), [http://www.americanbar.org/content/dam/aba/events/labor\\_law/basics\\_papers/nlra/grievance\\_arbitration.aucthecheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/nlra/grievance_arbitration.aucthecheckdam.pdf).

<sup>199</sup> *United Steelworkers of America*, 363 U.S. at 582-83 ("An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.").

<sup>200</sup> See, e.g., MASS. GEN. LAWS ch. 71, § 42 (LexisNexis 2016).

<sup>201</sup> See discussion *supra* Section III.C.

<sup>202</sup> See ch. 71, § 42 (LexisNexis).

determine whether it is in the “best interests of the pupils” to reinstate a teacher when a teacher dismissal dispute is at issue in an arbitration proceeding.<sup>203</sup>

The states’ judiciary branch can follow other jurisdictions and shift its focus to children’s rights during judicial review of arbitral awards involving educators’ student-related misconduct. First, the courts can work independent from, but implicitly in conjunction with, the legislature by interpreting teacher dismissal statutes using a children’s rights focus, as required in such statutes. In these cases, the arbitrators exercise the power to interpret the statute but the courts retain jurisdiction to review the statute’s meaning *de novo*<sup>204</sup> because courts are equipped with the power to interpret and determine what the law is.<sup>205</sup> *Geller* and *Zagaeski*, the two Massachusetts cases, illustrate this second potential safeguard.<sup>206</sup>

Second, courts may choose to take a less deferential standard when reviewing arbitration awards that concern the reinstatement of educators who engaged in student-related misconduct.<sup>207</sup> *Geller* illustrates how this safeguard would potentially operate in practice. In *Geller*, Judge Ireland explained that in order to consider the best interests of the students, the Supreme Court of Massachusetts had to be less deferential to arbitration awards and allocate greater weight to the public policy calling for the protection of children in schools.<sup>208</sup> This safeguard is effective because the court directly considers the risks, harms, and other consequences that students face after the reinstatement of an educator who previously engaged in student-related misconduct.

Finally, the courts can hold that public school employee’s disciplinary matters are managerial or educational public policy matters and thus non-negotiable and non-arbitrable.<sup>209</sup> Categorizing disciplinary matters as managerial and as pertaining to educational public policy prevents the union from bargaining or arbitrating the matter and allows the employer to retain discretion over employee disciplinary matters.<sup>210</sup>

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<sup>203</sup> § 42.

<sup>204</sup> *See id.*

<sup>205</sup> *See generally* *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>206</sup> *See supra* Section III.C. (discussing *Geller* and *Zagaeski* in detail).

<sup>207</sup> *See, e.g., Geller*, 755 N.E.2d at 1251.

<sup>208</sup> *Id.*

<sup>209</sup> *See* *TUSSEY*, *supra* note 61; *Sch. Dist.*, 199 N.W.2d at 759 (explaining that managerial prerogatives and matters of public policy are not negotiable). *See generally* *Sch. Dist.*, 199 N.W.2d 752; *Sch. Comm. of Boston*, 363 N.E.2d 485; *Reg’l Sch. Unit No. 5*, 121 A.3d 98.

<sup>210</sup> *See, e.g., Sch. Dist.*, 199 N.W.2d at 759 (“While there are many nebulous areas that may overlap working conditions, boards should not be required to enter negotiations on matters which are predominately matters of educational policy, management prerogatives, or statutory duties of the board of education.”).

## 2. Workability and Sustainability of Legislative and Judicial Safeguards

Legislative action is workable and sustainable. Legislative action would be lengthy during the drafting phase but expedient during execution.<sup>211</sup> The process of policy making varies from state to state because each state is autonomous. In order to draft and pass legislation that will have the effect of the law, the majority of legislators often need to agree on the terms.<sup>212</sup> The process can be complicated and lengthy because the legislation may pass through different committees before reaching the Governor's desk.<sup>213</sup> However, once the legislation is enacted, the statute has a chance of expedient implementation.

Simple mandates are capable of immediate implementation because they do not require many resources for full compliance.<sup>214</sup> Speed limits are an example of simple mandates. Under these mandates, a driver violates the mandate if the driver drives over the speed limit.<sup>215</sup> Consequences may follow, namely a monetary fine.<sup>216</sup> Conversely, to follow the mandate, the driver need only drive at or below the speed limit. The action does not require additional resources in order to comply. This example shows that a bright-line rule, when feasible, can be effective in certain situations. Similarly, state legislatures can enact laws that clearly prohibit educator disciplinary matters from collective bargaining or potentially arbitration, or that do not prohibit bargaining or arbitration, but do set limitations.<sup>217</sup> Compliance with these laws would not require any resources besides the unions' and the public employers' recognition that they cannot submit disciplinary issues to arbitration.

A statute is also highly sustainable over time because once a jurisdiction decides to enact legislation, the legislation will remain in place until the legislature decides to undergo the lengthy law-making process to supersede the law with new legislation<sup>218</sup> or until a court declares the legislation defective or inoperative in some way.<sup>219</sup>

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<sup>211</sup> See, e.g., *Making Law: Pennsylvania*, COMMONWEALTH OF PENNSYLVANIA HOUSE OF REPRESENTATIVES, <http://www.pacapitol.com/Resources/PDF/Making-Law-In-PA.pdf> (last visited Oct. 31, 2016).

<sup>212</sup> *Id.*

<sup>213</sup> See, e.g., *id.*

<sup>214</sup> See, e.g., 75 PA. CONS. STAT. § 3362 (2016) (Pennsylvania's maximum speed limit statute).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> See discussion *supra* Section V.A.1.

<sup>218</sup> See, e.g., *supra* note 211.

<sup>219</sup> See, e.g., *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1920) (striking down a statute because the statute did not provide a discernable standard of guilt).

The judicial safeguards proposed are also workable and sustainable. For example, in Massachusetts, the court's heightened focus on the students' best interests have proven effective for over a decade after the legislature enacted the teacher dismissal statute.<sup>220</sup>

*B. Public Employer-Employee Reform Oriented Safeguard: Advocating for Non-Arbitrability of Educator Disciplinary Matters*

This section presents two safeguards that are particularly promising. As two autonomous parties who have the freedom of contract to decide what employment contract provisions to bargain for and include within the arbitration clauses' scope,<sup>221</sup> the public employer and employee may choose one of the following proposals without legislative or judicial action: (1) refrain from bargaining employee disciplinary matters or (2) bargain disciplinary procedures but refrain from including employee disciplinary matters within the scope of the arbitration clause. The two options require commitment from both parties and willingness to curtail some of the current benefits enjoyed<sup>222</sup> in order to further the students' best interests. Reforms from within, involving the two primary parties, are more likely to last because union members are more likely to exhibit buy-in when the union members are part of the policy-making process.<sup>223</sup>

*1. Workability and Sustainability of Internal Safeguards*

The proposed safeguards can be difficult to implement. Unions and employers favor arbitration as a method of alternative dispute resolution because the method provides expediency, relatively low costs, and expertise.<sup>224</sup> A reform from within would require that one party (or both parties) change his or her view on what furthers his or her self-interests and focus on what best serves the best interests of the students. Such reform may be difficult because the approach is contrary to the current approach, where the employer advocates for the employer's self-interests and the union advocates for the union members' interests.<sup>225</sup>

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<sup>220</sup> See discussion *supra* Section III.C.

<sup>221</sup> See discussion *supra* Sections II.A., II.B. (detailing the relationship between public employers and employees).

<sup>222</sup> *Id.*

<sup>223</sup> Maurice Harvey, *Getting Buy-In*, PUBLIC BROADCASTING SERVICE (PBS), <http://www.pbs.org/makingschoolswork/sbs/csp/buyin.html> (last visited Oct. 31, 2016) (explaining the importance of buy-in, or ownership in a proposal, in order to sustain a new education policy).

<sup>224</sup> See Rapp, *supra* note 22, § 7.01.

<sup>225</sup> See Rapp, *supra* note 22, § 7.04 (2)(c) (describing the management's and union's key objectives during the bargaining process).

To understand the difficulty of implementing an internal reform, consider the alternatives for both parties. Based on the historical background and current arbitration trends in public employer-employee relations, if the employer advocates for and succeeds in not bargaining or arbitrating employee disciplinary matters, the employer will only have two alternatives: (1) an internal grievance mechanism or (2) the court system.<sup>226</sup> An internal grievance system is desirable from the employer's perspective but this grievance process is unlikely to prevail as the chosen mechanism because the union is unlikely to agree to that term.<sup>227</sup> Both parties will likely prefer the first option because the second option, the court system, can be lengthy and costly.<sup>228</sup> Costs and lengthy procedures may deter the employer from litigating employee dismissal disputes if the employer considers the claims too weak to warrant further pursuance.

Union members would also face the same two primary alternatives: (1) use the internal grievance procedures or (2) file a complaint with the court system. Arbitration serves as the number one method to ensure fidelity to the arbitration clauses.<sup>229</sup> Thus, neither of the two alternatives may be ideal for educators.<sup>230</sup> An internal grievance process can be implicitly or explicitly biased because the board will likely be composed of the public employer's management.<sup>231</sup> Because a teacher dismissal grievance places the teacher in an adversarial position against the employer, an internal grievance procedure can be intimidating for the educator.<sup>232</sup> Bargaining for an internal grievance procedure also virtually eliminates the employees' equal bargaining power because in an internal grievance proceeding the employer has direct control over the creation of the clauses governing the internal grievance proceeding.<sup>233</sup> The union would also have the court system as an alternative.<sup>234</sup> This option may be costly and lengthy, particularly for the union members who may be less financially stable than the employer and may be less likely than the employer to have the necessary funds to litigate the matter over protracted periods of time. The risk of lengthy and costly proceedings may persuade the union to agree to an internal grievance proceeding, leaving the union members at a disadvantage.

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<sup>226</sup> See discussion *supra* Sections II.A., II.B.

<sup>227</sup> See Rapp, *supra* note 22, § 7.01 (explaining public employees prefer arbitration to internal grievance procedures because arbitration allows a neutral third party to determine whether the employer violated the CBA).

<sup>228</sup> See *id.* § 7.08.

<sup>229</sup> See *id.*

<sup>230</sup> See *id.*

<sup>231</sup> See *id.* § 7.04.

<sup>232</sup> See generally Rapp, *supra* note 22, § 7.01.

<sup>233</sup> See generally *id.* § 7.04.

<sup>234</sup> See Rapp, *supra* note 22, § 7.04.

Though difficult to implement, once implemented, the safeguards (refraining from bargaining disciplinary matters or bargaining disciplinary matters but refraining from arbitrating such matters) offer benefits to both parties and ensure long-term sustainability. The management will not see its managerial powers infringed because the management will be able to decide on the appropriate methods of discipline, without third party interference.<sup>235</sup> On the other hand, union members can benefit from litigating first, rather than arbitrating first. A judicial forum affords the right to jury trial.<sup>236</sup> This can be significant for the employees because the jury may be composed of other employees who are more likely to understand the employee's position.<sup>237</sup> The union would also benefit, as the union would avoid spending time and money arbitrating, and subsequently spending additional time and money going to court for judicial review. In other words, having only the judicial system as an option allows the union to litigate the matter in this forum without having to first submit the dispute to arbitration. A single proceeding saves time and money.<sup>238</sup> Moreover, a judicial forum allows the employees to perform extensive discovery and present all relevant material to present a full case.<sup>239</sup> These benefits are likely to ensure sustainability once the public employers and employees adopt the safeguards.

### *C. Process-Oriented Safeguards: Third Party Representative or Different Arbitration Focus*

Perhaps the strongest, most effective safeguards lie in the arbitral procedure itself. Arbitration provides benefits for both parties, including education experts in an expedient and private proceeding as an alternative to a public, potentially lengthy litigation.<sup>240</sup> Arbitration can continue to be an integral part of the public employer-employee labor relations but can be stronger if the arbitrator maintains children's rights at the forefront in his or her analysis. Because the primary and secondary education field involves underage students, who are vulnerable and underdeveloped,<sup>241</sup> the arbitration procedure should be

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<sup>235</sup> See generally *Sch. Dist.*, 199 N.W.2d 752; *N.J. Tpk. Auth.*, 670 A.2d 1 (discussing the importance of safeguarding the employer's managerial prerogatives).

<sup>236</sup> U.S. CONST. amend. VII. ("In Suits at common law . . . the right of trial by jury shall be preserved.").

<sup>237</sup> J. Ric Gass, *Handling Sympathy in Jury Trials: Introduction*, PLI Litig. & Admin. Practice Course Handbook Series No. 455 at 37, 43 (1933).

<sup>238</sup> See Rapp, *supra* note 22, § 7.08 (explaining the stakeholders' desire for expedient, low-cost procedures).

<sup>239</sup> Christopher R. Drahozal, *'Unfair' Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 751 (2001) (identifying certain characteristics particular arbitration: "ability to select the arbitrator, limited discovery, lack of an appeals process . . ."). While limited discovery does not mean that the parties will not be able to present their cases fully, limited discovery increases the likelihood that parties will not be able to present a piece of evidence the parties wanted to present.

<sup>240</sup> See Rapp, *supra* note 22, § 7.08.

<sup>241</sup> See, e.g., *Miller*, 132 S. Ct. at 2464.

wary of resolving disputes between public school employers and employees without considering children's rights. Arbitration is typically included in CBAs as a final, binding, and preferred dispute resolution mechanism<sup>242</sup> and arbitrators should take a strong stance for children's rights because they may be the last arbiter standing between defenseless children in schools and educators who may be incapable of fostering a safe environment for the children.

This section presents two main options that would permit arbitrators to incorporate children's rights to the forefront of their analysis when determining whether to reinstate an educator who has engaged in student-related misconduct. First, both parties can choose to include a third party representative to represent the students' collective interests. Because the third-party representative would represent all students collectively in the abstract, both the employer and employee would likely split the cost of retaining the third-party representative. One avenue for implementing this safeguard is to have an association or organization that represents the families, such as a parent-teacher association, choose the representative. The idea of having a third party represent children is not new. For example, in states across the United States, guardian ad litem often represent the best interests of the children in court proceedings involving children.<sup>243</sup>

Second, the arbitrator can include the children's well-being as an additional factor in his or her analysis. Adding an additional factor can occur in several ways. The arbitrator can derive its authority from the CBA to directly consider the students' best interests.<sup>244</sup> This option requires that the public employer and employees include in the CBA the importance of considering the students' best interests when determining whether to reinstate a teacher who has engaged in student-related misconduct.<sup>245</sup> The arbitrator can also derive its authority to directly consider the students' best interests if the school districts' school codes and state statutes require that the arbitrator do so, as the state legislature has done in Massachusetts.<sup>246</sup> Finally, the arbitrator can place a greater emphasis on children's rights and their best interests when determining whether to reinstate a teacher who has engaged in student-related misconduct. An arbitrator may be more likely to consider whether the award will violate public policy because the arbitrator risks having a court vacate the award as a violation of public policy.<sup>247</sup> When determining whether the

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<sup>242</sup> See Rapp, *supra* note 22, § 7.08.

<sup>243</sup> *Guardian ad litem*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010) ("A person appointed by the court during the course of litigation, in which an infant or a person mentally incompetent is a party, to represent and protect the interests of the infant or incompetent.").

<sup>244</sup> See generally discussion *supra* Section III.A.

<sup>245</sup> See generally discussion *supra* Section III.C.

<sup>246</sup> See MASS. GEN. LAWS ch. 71, § 42 (LexisNexis 2016); see generally discussion *supra* Section III.C.

<sup>247</sup> See, e.g., *Neshaminy Sch. Dist.*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 185, at \*20 (holding that the award violated public policy); *Bethel Park Sch. Dist.*, 55 A.3d at 160-61 (holding that the award violated public policy).



award violates public policy, the arbitrator has an opportunity to focus on the children's rights, placing greater emphasis on the best interests of the students.

### *1. Workability and Sustainability of the Process-Oriented Safeguards*

Both proposals are workable and sustainable, particularly when concerted efforts are in place. The first proposed safeguard, the addition of a third-party representative, presents more difficulty to implement than the latter safeguard, the arbitrators' consideration of children's rights as an additional factor during arbitral proceedings. Including a third-party representative will likely require additional costs in the arbitral proceedings, but the benefits of safeguarding the rights of students offset the costs. Additionally, both parties may divide the costs equally to decrease party expenses.

A deeper issue with the addition of a third-party representative is the potential infringement on the parties' autonomy and contractual relationships.<sup>248</sup> A contractual relationship under a CBA includes only the employer and, collectively, the employees. Requiring a third party representative only during the arbitral proceeding in essence adds a non-signatory party to the contractual agreement. Such an addition may be problematic because parties who did not sign the contract did not partake in the bargaining process and did not agree to the final terms. However, the non-signatory party in this situation will participate in the arbitral proceeding and will likely offer viewpoints on the original CBA provisions. The parties may perceive the addition of the non-signatory party as an infringement of their autonomy to negotiate the CBA terms in accordance to their individual intents or objectives.

Other questions may surge as well. For example, when should the parties decide who will serve as a third party representing the children's interests? And, what role, if any, do the children have in deciding who represents their interests? As a starting point, school districts that choose to implement this safeguard can model the third party representative's role after familiar roles, such as guardian ad litem who often represent the interests of children in court proceedings. School districts can also seek community input in order to adopt a safeguard supported by the district and families.

The second safeguard, the arbitrator's consideration of children's rights as an additional factor during the arbitral proceeding, is a no-cost option that brings children's rights to the forefront of the analysis. However, an arbitrator derives his or her authority from the CBA and is bound by statutory limitations.<sup>249</sup> Hence, this second safeguard requires concerted efforts in order to remain sustainable. Concerted efforts may include, for example, that the states' legislatures enact laws that require that the arbitrators consider children's rights during arbitral proceedings.<sup>250</sup> Other concerted efforts may also include that the public employers and employees indicate explicitly that they prefer that the arbitrators consider the children's rights during arbitral proceedings. These efforts will

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<sup>248</sup> See generally Rapp, *supra* note 22, § 7.04.

<sup>249</sup> *Id.*

<sup>250</sup> See, e.g., MASS. GEN. LAWS ch. 71, § 42 (LexisNexis 2016).

allow arbitrators to consider the children's rights as an additional factor during the arbitral proceedings, while deriving the authority to do so from the CBA and within statutory limitations. If thoughtfully chosen and implemented, any of the safeguards can be workable and sustainable over time.

## VI. CONCLUSION

Children's rights have remained largely ignored in the public school labor relations context. Yet, children can be the vulnerable, third-party recipients of consequences following the reinstatement of an educator who engaged in student-related misconduct.<sup>251</sup> Public employee disciplinary matters may be arbitrable, allowing both the employer and employee to submit to final, binding arbitration. During the arbitration process, arbitrators often focus their analyses on the contractual language of the CBAs.<sup>252</sup> If the arbitral awards come within the purview of the courts, the courts remain largely deferential toward these arbitral awards. The courts will likely consider whether the awards violate public policy but the analyses are rarely direct analyses of the children's rights.<sup>253</sup> Jurisdictions in which public employees' disciplinary matters are arbitrable, should adopt legislative, judicial, employer-employee, and arbitration-process driven safeguards.<sup>254</sup> These safeguards will help ensure that children's rights remain at the forefront in the public school labor relations context when an educator has engaged in student-related misconduct.<sup>255</sup>

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<sup>251</sup> See generally discussion *supra* Sections III.A, III.B., III.C.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> See generally discussion *supra* Section V.

<sup>255</sup> *Id.*